

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. 20-CR-196

THOMAS E. SMITH,
STEPHEN E. SMITH,
SAMUEL A. DAVIS,
ROBERT HAMILTON, and
JONATHAN HENLEY,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. 20-CR-197

TARONE WOODS

Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. 20-CR-199

DEON PETTY,

Defendant.

UNITED STATES OF AMERICA,
Plaintiff,

v.

Case No. 20-CR-202

MARVIN FITZGERALD

Defendant.

GOVERNMENT'S POSITITON ON RESTITUTION FOR SENTENCING

The Court has set sentencing hearings for the defendants in the above-captioned cases on various dates in June and July 2021. Though some of these defendants were charged separately, each participated in a single scheme to obtain fraudulent Paycheck Protection Program (“PPP”) loans in the spring and summer of 2020. Accordingly, for the defendants who owe restitution, their obligations are overlapping. Through this submission, the government seeks to outline the relative obligations for each defendant regarding restitution.¹

I. PROCEDURAL HISTORY

On October 20, 2020, a grand jury returned a 14-count indictment charging Thomas E. Smith (“Thomas Smith”), Stephen E. Smith (“Stephen Smith”), Samuel A. Davis (“Davis”), Robert Hamilton (“Hamilton”), and Jonathan Henley (“Henley”) with participation in a bank fraud scheme between April 2020 and July 2020, in violation of Title 18, United States Code, Section 1344, and Thomas Smith, Stephen Smith, Davis, and Hamilton with engaging in money laundering, in violation of Title 18, United States Code, Section 1957. *See* Indictment, Dkt. No. 1.

Thomas Smith pled guilty to Count Two of the Indictment (Bank Fraud, in violation of Title 18, United States Code, Section 1344) on February 23, 2021. Thomas Smith Plea Agreement, 20-CR-196, Dkt No. 53. Stephen Smith pled guilty to Count Two of the Indictment (Bank Fraud, in violation of Title 18, United States Code, Section 1344) on April 12, 2021. Stephen Smith Plea Agreement, 20-CR-196, Dkt No. 73. Samuel

¹ The government’s position regarding each defendant’s forfeiture, to the extent it exists, will be addressed in the government’s sentencing memorandum for each defendant before sentencing.

Davis pled guilty to Count One of the Indictment (Bank Fraud, in violation of Title 18, United States Code, Section 1344) on December 1, 2020. Samuel A. Davis Plea Agreement, 20-CR-196, Dkt No. 25. Robert Hamilton pled guilty to Count Three of the Indictment (Bank Fraud, in violation of Title 18, United States Code, Section 1344) on January 6, 2021. Robert Hamilton Plea Agreement, 20-CR-196, Dkt No. 38. Jonathan Henley pled guilty to Count Six of the Indictment (Bank Fraud, in violation of Title 18, United States Code, Section 1344) on January 6, 2021. Jonathan Henley Plea Agreement, 20-CR-196, Dkt No. 42.

On October 23, 2020, Tarone Woods was charged by Information with one count of false statements, in violation of Title 18, United States Code, Section 1001. Information, 20-CR-197, Dkt. No. 2. He entered a guilty plea to this charge on November 10, 2020. Tarone Woods Plea Agreement, 20-CR-197, Dkt No. 2.

On October 27, 2020, Deon Petty was charged by Information with one count of conspiracy to defraud the United States, in violation of Title 18, United States Code, Section 371. Information, 20-CR-199, Dkt. No. 1. He entered a guilty plea to this charge on November 10, 2020. Deon Petty Plea Agreement, 20-CR-299, Dkt No. 4.

On November 2, 2020, Marvin Fitzgerald was charged by Information with one count of false statements, in violation of Title 18, United States Code, Section 1001. Information, 20-CR-202, Dkt. No. 1. He entered a guilty plea to this charge on December 9, 2020. Marvin Fitzgerald Plea Agreement, 20-CR-202, Dkt No. 2.

Upon the government's motion, the Court found that all of the cases were related and that the cases would be handled together. As a result, Petty's case was reassigned to this Court on December 1, 2020. *See* Dkt No. 33.

II. LEGAL AUTHORITY

Restitution is governed by the Mandatory Victims Restitution Act. *See* 18 U.S.C. § 3663A. In pertinent part, the Act provides that "the court shall order...that the defendant make restitution to the victim of the offense" when the offense of conviction or plea agreement is one listed in the statute, including those where "an identifiable victim or victims has suffered a...pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B).

Restitution amount is calculated based on the actual loss incurred by the victim. *See United States v. Dridi*, 952 F.3d 893, 901 (7th Cir. 2020).² In a scheme offense, the amount of restitution can "include losses incurred in the entire scheme, not just losses from the individual transactions specified in the indictment." *United States v. Meza*, 983 F.3d 908, 916 (7th Cir. 2020) (referring to wire fraud scheme); *United States v. Belk*, 435 F.3d, 817, 819 (7th Cir. 2006) (in mail fraud scheme, finding "restitution for the whole scheme is in order" rather than limiting amount to individual counts of conviction). A "district court has wide discretion in determining the appropriateness and amount of restitution." *United States v. Emerson*, 128 F.3d 557, 566 (7th Cir. 1997). The government

² Loss used to calculate restitution may differ from the loss amount used to determine the applicable Sentencing Guidelines range for a defendant under § 2B1.1. *See United States v. Fennell*, 925 F.3d 358, 362 (7th Cir. 2019) (restitution required by statute to be based on the "loss amount that the defendant actually caused, even if some greater sum was intended"). To illustrate, loss for a bank fraud scheme under § 2B1.1 is "the greater of actual loss or intended loss." *See* § 2B1.1, Application note 3(A). To illustrate, as applied in this case, a PPP loan applied for, but not funded would constitute intended loss, but not actual loss. Therefore, the unfunded loan would not be included in a restitution calculation. *Fennell*, 925 F.3d at 362.

is required to prove the amount of the victim's loss for restitution purposes by a preponderance of the evidence. *United States v. Meza*, 983 F.3d 908 (7th Cir. 2020).

In the Seventh Circuit and elsewhere, “co-conspirators are held jointly and severally liable for all foreseeable losses within the scope of their conspiracy regardless of whether a specific loss is attributable to a particular conspirator.” *United States v. Moeser*, 758 F.3d 783, 797 (7th Cir. 2014). This is true regardless whether the defendants actually were charged with conspiracy. *See United States v. Martin*, 195 F.3d 961, 969 (7th Cir. 1999) (finding co-schemers, not just co-conspirators, are jointly and severally responsible for restitution owed); *see also United States v. Adeniji*, 221 F.3d 1020, 1029 (7th Cir. 2000) (“Congress has specifically authorized joint and several liability for restitution in cases involving joint criminal endeavors”). It is within a district court’s discretion to apportion joint and several restitution among those responsible. *See* 18 U.S.C. § 3664(h) (“If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for the payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim’s loss and economic circumstances of each defendant.”). The amount assigned to a defendant may include “losses caused by the foreseeable acts of [the defendant’s] co-conspirators.” *See United States v. Rand*, 403 F.3d 489, 495 (7th Cir. 2005) (“co-conspirators generally are jointly and severally liable for injuries caused by the conspiracy,” including for restitution purposes). Or, a court can use a “hybrid approach” for restitution, where each defendant may owe a different amount and be jointly and severally liable with a different subset of the defendant

group. See *United States v. Sheets*, 814 F.3d 256, 260 (5th Cir. 2016) (describing the “hybrid approach” to use “a combination of the apportionment of liability approach while concurrently making all of the defendants jointly and severally liable”).³

Regardless of the amount apportioned to any individual defendant, it is unlawful for the amount of restitution paid to exceed the total amount adjudged to have been owed, so restitution awards must be capped at total loss. *United States v. Oliver*, 873 F.3d 601, 609 (7th Cir. 2017) (entering order “to limit any victim’s recovery to the amount of her loss”). Further, any amounts that a defendant has returned before sentencing should be deducted from the restitution order. See *United States v. Swanson*, 394 F.3d 520, 528 (7th Cir. 2005) (citing Section 3663A(b)(1)(B)(i)(II)).

III. LOANS INVOLVED IN FRAUD SCHEME

Each of the defendants’ plea agreements details the respective defendant’s involvement in obtaining one or more fraudulent PPP loans from Financial Institution 1.

This includes:

³ The application of credit for payments towards restitution may appear complicated in such a hybrid situation. However, several recent opinions explain that a defendant must continue to pay restitution on his payment schedule unless and until “the victim...is compensated in full, or until [the defendant’s] payments exceed” the amount he was personally ordered to pay. See *United States v. Wilson*, 2020 WL 5412976, at *6 (E.D. Ky. Sept. 9, 2020) (co-defendant’s payments in excess of defendant’s ordered restitution did not relieve her of her own restitution payment obligation); see also *United States v. Yalincak*, 2020 WL 1969490 (D. Conn. Apr. 24, 2020); *United States v. Boradbent*, 225 F.Supp.3d 239 (S.D.N.Y. 2016).

Applicant Company	Company Owner	Individuals Involved in Obtaining Loan	Funded Loan Amount
Davis Development Group Inc.	Samuel Davis	Samuel Davis Thomas Smith Stephen Smith	\$177,500
Rebels Paris LLC	Deon Petty	Deon Petty Thomas Smith Stephen Smith Marvin Fitzgerald	\$155,000
CFA Auto Transport LLC	Stephen Smith	Thomas Smith Stephen Smith	\$242,500
Glory Transportation Services LLC	Robert Hamilton	Robert Hamilton Thomas Smith Stephen Smith	\$155,000
Comfort Care Transit LLC	Tarone Woods	Tarone Woods Thomas Smith	\$230,000
Premier Logistic Solutions LLC	Jonathan Henley	Samuel Davis Jonathan Henley Thomas Smith	\$0 ⁴
New Beginnings Family Services LLC	Stephen Smith / Marvin Fitzgerald	Marvin Fitzgerald Thomas Smith Stephen Smith	\$0 ⁵
Total			\$960,000

IV. INDIVIDUAL DEFENDANT'S RESTITUTION OBLIGATIONS

Though the offenses were executed through a single scheme, the specific facts and offenses of each conviction require a more nuanced application of MVRA. As detailed below, only Thomas Smith was involved in all seven of the loans, including the five funded loans. Other defendants were not involved with, nor were they aware that Thomas Smith was working with others to obtain fraudulent loans. Still other defendants knew of some, but not all, of the other loan applications.

⁴ The Premier Logistic loan application sought \$212,500.

⁵ The New Beginnings loan application sought \$230,000.

A. Thomas Smith

1. Facts

Thomas Smith pled guilty to participating in the bank fraud scheme. *See* Thomas Smith Plea Agreement ¶ 4. According to the factual basis in his plea agreement, Smith was involved with all seven of the PPP loan applications and the five loans funded by Financial Institution 1. *See Id.* Attachment B ¶ 18.

For the CFA loan, Thomas Smith helped Stephen Smith create a fraudulent loan application package for Smith to obtain the loan. *Id.* ¶¶ 19-20. Stephen Smith agreed to pay Thomas Smith a portion of the loan proceeds once received. *Id.* ¶ 24. After the loan was funded, Stephen Smith obtained three cashier's checks totaling \$65,000 payable to Thomas Smith and two of Thomas Smith's companies. These facts are confirmed in the factual basis from Stephen Smith's plea agreement where Stephen Smith acknowledged that he approached Thomas Smith to learn how to apply for a loan for CFA after learning that Thomas Smith received PPP loan funding for his companies. *See* Stephen Smith Plea Agreement, Attachment B ¶ 18. Stephen Smith confirms that of the \$242,500 that he received as a PPP loan for CFA, he paid Thomas Smith \$65,000 in the form of cashier's checks payable to Thomas Smith and his companies. *Id.* ¶ 23.

For the Rebels Paris loan, Thomas Smith helped Stephen Smith create the fraudulent loan application package to provide to Petty to obtain the loan. *See* Thomas Smith Plea Attachment B ¶¶ 25, 26. Petty agreed that he would share proceeds from his loan with Stephen Smith and Thomas Smith. *Id.* ¶ 30. After the loan was funded, Petty gave Thomas Smith \$45,000 in cashier's checks payable to Thomas Smith and two of his companies. *Id.* After Financial Institution 1 froze Petty's bank account, Thomas

Smith created a fake lease between one of his companies and Rebels Paris in order to conceal Petty's illegal payments to Thomas Smith. *Id.* ¶ 31. These facts are confirmed in the factual basis from Petty's plea. Petty agreed with Thomas Smith (referred to as CC-1) and Stephen Smith (referred to as CC-2) to obtain a fraudulent loan for Rebels Paris. *See* Deon Petty Plea Agreement, Attachment B ¶ 8. Petty also agreed to and did pay Thomas Smith and his companies \$45,000 in cashier's checks. *Id.* ¶ 16.

For the Davis Development Group loan, Thomas Smith created a fraudulent loan application package for Davis. Thomas Smith Plea Attachment B ¶ 40. Because Davis Development Group was not in good standing with the State of Illinois, Thomas Smith provided Davis with money for the fee to reinstate his company, a prerequisite to obtaining PPP funding. *Id.* Before applying, Davis agreed to pay Thomas Smith a portion of the loan proceeds once the loan was funded, and Davis did so, issuing a cashier's check for \$75,000 payable to one of Thomas Smith's business. *Id.* ¶ 45. Thomas Smith and Stephen Smith drove to Milwaukee to pick up the check from Davis. *Id.* After Financial Institution 1 froze some of Thomas Smith's bank accounts, he contacted Davis and provided Davis with a fake joint venture agreement designed to conceal the true nature of the \$75,000 payment. *Id.* ¶ 46. The agreement falsely claimed that Davis' company was entering into a joint venture with Thomas Smith's company to invest in a nursing home that did not exist. *Id.* Samuel Davis's plea agreement confirms these basic facts, including that Thomas Smith sent him \$400 to reinstate Davis Development Group with the State of Illinois and that Thomas Smith assisted Davis in completing the paperwork. *See* Samuel Davis Plea Agreement, Attachment B at ¶¶ 13,

14. Davis also confirmed that he issued a cashier's check for \$75,000 payable to Thomas Smith's company, and that Thomas Smith and Stephen Smith drove to Chicago to pick it up from him. *Id.* ¶ 20.

For the Glory Transportation loan, Thomas Smith created the fraudulent loan application for Hamilton based on the information Hamilton provided about his company. Thomas Smith Plea Agreement ¶ 47. Thomas Smith gave Hamilton instructions on how to get the loan application processed. *Id.* Hamilton agreed to pay Thomas Smith a portion of the loan proceeds. *Id.* ¶ 52. After the loan was funded, Hamilton obtained a cashier's check payable to Thomas Smith for \$30,000. *Id.* Thomas Smith told Hamilton that if anyone asked about why he was paying the \$30,000, Hamilton should falsely say that the funds were to purchase cars and equipment. *Id.* ¶ 53. In Hamilton's plea agreement, he states that Stephen Smith directed him to Thomas Smith to apply for fraudulent PPP loan for Glory Transportation. *See* Robert Hamilton Plea Agreement ¶ 11. Hamilton gave Thomas Smith details about his company and Thomas Smith prepared the application. *Id.* ¶ 12. Hamilton agreed to pay Thomas Smith \$30,000 for assisting in putting the application together. *Id.* When Hamilton handed the payment to Thomas Smith, Hamilton recalled that Thomas Smith told him if anyone asked to say that the money was for equipment or vans. *Id.* ¶ 17.

For the Comfort Care loan, Thomas Smith created the fraudulent loan application for Woods based on the information Woods provided about his company. Thomas Smith Plea Agreement ¶ 60. Thomas Smith gave Woods directions about how to drop off the loan application. *Id.* Woods agreed to give Thomas Smith some of the

funds he obtained from the loan. *Id.* ¶ 65. After it was funded, Woods obtained cashier's checks for \$115,000 payable to Thomas Smith and his companies. These facts are confirmed in Woods' plea agreement which noted that Thomas Smith provided Woods with a loan application package for Comfort Care and that he agreed to, and did, pay Thomas Smith \$115,000 from the loan he fraudulently obtained at Thomas Smith's direction. *See Tarone Woods Plea Agreement, Attachment B* ¶¶ 12, 16.

For the Premier Logistic loan, Thomas Smith created the fraudulent loan application for Henley based on the information Henley provided about his company. Thomas Smith Plea Agreement ¶ 34. Thomas Smith provided the application to Henley. *Id.* ¶ 38. Henley agreed to pay Thomas Smith a portion of the loan proceeds, if funded, but ultimately, the loan was not approved. *Id.* ¶ 39. Henley confirmed that he provided Thomas Smith information about his company, opened a bank account at Financial Institution 1 at Thomas Smith's direction, and agreed to pay Thomas Smith a portion of the money from the loan. *See Jonathan Henley Plea Agreement* ¶¶ 15, 16, 18.

For the New Beginnings loan, Thomas Smith assisted Stephen Smith and Fitzgerald in creating a fraudulent loan application. Thomas Smith Plea Agreement, Attachment B ¶ 33. In Fitzgerald's plea agreement, he noted that Stephen Smith assisted him most directly with preparing the loan application. *See Marvin Fitzgerald Plea Agreement* ¶¶ 14-15. Financial Institution 1 did not fund this loan. *Id.* ¶ 15.

2. Argument

Thomas Smith should be ordered to pay \$960,000 in restitution, based on the five funded PPP loans that he facilitated. *Dridi*, 952 F.3d at 901 (discussing actual loss a

defendant caused as basis for restitution amount). As each of the plea agreements detailed above show, Thomas Smith was personally involved with (and in many cases himself prepared) the loan applications for each of the five funded loans. He also had a personal stake in Financial Institution 1's losses, receiving large transfers of money via cashier's checks from his co-defendants, totaling \$330,000.

Despite his central role, Thomas Smith did not act alone. Therefore, his obligations should be joint and several with the others who engaged in the offense, as described in detail for each co-schemer below. *See Adeniji*, 221 F.3d at 1029 (those who engage in joint criminal endeavors share restitution obligations jointly and severally). Additionally, amounts the co-schemers pay towards restitution should be considered in determining Thomas Smith's total restitution obligation to ensure that Financial Institution 1 does not recover more than its actual losses. *Oliver*, 873 F.3d at 609 (discussing the need to avoid over-recovery).

As discussed below, some of the proceeds of funds obtained as part of the scheme may have been frozen in accounts held at Financial Institution 1. This fact does not reduce or offset the amount that the Court should order in restitution. *See infra* Section V.

B. Stephen Smith

1. Facts

Stephen Smith pled guilty to participating in the bank fraud scheme. According to the factual basis of his plea, he approached Thomas Smith to determine how to obtain a PPP loan for his company, CFA. *See* Stephen Smith Plea Agreement ¶ 18. The loan

falsely claimed that CFA was operational with employees and monthly salaries. *Id.*

¶ 20. Stephen Smith knew this was false, but he nevertheless submitted a fraudulent application and obtained \$242,500 in a loan for CFA. *Id.* ¶ 22. Stephen Smith then provided \$65,000 of the loan proceeds directly to Thomas Smith. *Id.* ¶ 23.

Stephen Smith also agreed to help Petty obtain a loan for Rebels Paris, and actually created (with help from Thomas Smith) the fraudulent loan application with information about Rebels Paris which Petty provided. *Id.* ¶ 25. Petty agreed to, and did, provide \$30,000 to Stephen Smith using cashier's checks from the loan proceeds. *Id.* ¶ 29. According to Petty's plea agreement, Stephen Smith directed Petty to open a business checking account at Financial Institution 1 to facilitate the application process. *See Deon Petty Plea Agreement, Attachment B ¶ 10.*

Stephen Smith was involved in Robert Hamilton's fraudulent loan application. Stephen Smith approached Hamilton to see if he had already received a PPP loan for his company, and upon learning that Hamilton had not, Stephen Smith connected Hamilton to Thomas Smith. *See Robert Hamilton Plea Agreement, Attachment B ¶ 11.* Hamilton also reported that Thomas Smith had suggested Hamilton pay Stephen Smith \$10,000 from the loan proceeds, though Hamilton declined to do so. *Id.* ¶ 17.

Stephen Smith was involved in Samuel Davis' fraudulent loan application. Though he did not assist Davis in preparing the loan paperwork or submitting it, Davis understood that Stephen Smith would be a recipient of some of the fraudulent loan proceeds once obtained. *See Samuel Davis Plea Agreement, Attachment B ¶ 12.* Further, Stephen Smith traveled with Thomas Smith to collect the \$75,000 cashier's

check obtained from Davis' loan proceeds. *Id.* ¶ 20. Stephen Smith also was in contact with Davis after Financial Institution 1 began freezing certain bank accounts and suggested that Davis try not to implicate Thomas Smith if approached about the loan. *Id.* ¶ 24.

Stephen Smith also worked with Fitzgerald in an attempt to obtain a fraudulent loan for New Beginnings. *Id.* ¶ 30. New Beginnings was a defunct company Stephen Smith created years before, but he established Fitzgerald as the registered agent of New Beginnings to facilitate the fraudulent loan application process. *Id.* ¶ 31; *see also* Marvin Fitzgerald Plea Agreement, Attachment B ¶ 12. The loan ultimately was not funded. Stephen Smith Plea Agreement, Attachment B ¶ 32.

2. Argument

Stephen Smith should be ordered to pay \$730,000 in restitution. He was personally involved with obtaining fraudulent PPP loans for his own company, as well as for Deon Petty,⁶ and he played a part in the fraudulent Davis and Hamilton loans. So, either as a direct participant in each of the four loans, or as a participant in the broader conspiracy, the losses from all four loans to Financial Institution 1 were foreseeable to Stephen Smith. *Rand*, 403 F.3d at 495. Though Stephen Smith could be held responsible for the full \$960,000 in losses to Financial Institution 1, the government submits that a reduction is appropriate to fairly reflect certain loans which he was not

⁶ The restitution Stephen Smith owes does not account for the loan he tried to get for Marvin Fitzgerald because Fitzgerald's loan was not funded.

personally involved with, namely, Tarone Woods' application for Comfort Care.⁷ See 18 U.S.C. § 3664(h) (permitting court to "apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant"); see also *United States v. Whitley*, 354 F.Supp.3d 930, 933 (N.D.Ill. 2019) ("[C]ourts must use discretion and judgment to analyze the significance of the individual defendant's conduct in light of the broader causal process that produced the victim's losses.").

Stephen Smith's restitution obligation should be ordered to be joint and several with his co-conspirators, including Thomas Smith, Davis, Hamilton, and Petty. Any amounts the co-defendants pay towards restitution should be taken into account for Stephen Smith's total restitution obligation to ensure that Financial Institution 1 does not recover more than its actual losses. *Oliver*, 873 F.3d at 609 (discussing the need to avoid over-recovery).

C. Samuel Davis

1. Facts

Davis agreed to and did submit a loan application for Davis Development Group knowing that it was false and fraudulent. See Samuel Davis Plea Agreement, Attachment B ¶ 12. Thomas Smith approached Davis about getting a PPP loan for his company, Davis Development Group. *Id.* ¶ 12. Davis Development Group was not in good standing with the state, so Thomas Smith provided Davis with the \$400 needed to

⁷ There is similarly no evidence that Stephen Smith was aware of the loan application for Jonathan Henley, but, because that loan was not funded, it does not factor into the restitution analysis.

reinstate his company with the Secretary of State. *Id.* ¶ 13. Thomas Smith told Davis to pay him \$75,000 of the loan proceeds, and Davis agreed. *Id.* ¶ 12. After Davis obtained cashier's checks, Thomas Smith and Stephen Smith drove to Chicago to pick them up from Davis. *Id.* ¶ 20.

Davis also introduced Henley to Thomas Smith to try to facilitate a PPP loan for Henley's company, Premier Logistic. *Id.* ¶ 22. Davis drove with Henley from Chicago to Milwaukee to collect the paperwork for Henley's loan from Thomas Smith. *Id.*

2. Argument

Davis should be ordered to pay \$102,500 in restitution. This is calculated from the amount that Davis fraudulently obtained from Financial Institution 1 for the loan to his company Davis Development Group (\$177,500), subtracting the \$75,000 that he paid to Thomas Smith from the proceeds. *See* 18 U.S.C. § 3664(h) ("the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant"). As part of the investigation, the government was able to confirm that Davis obtained, and Thomas Smith deposited, a cashier's check payable to T and T Holdings LLC (a Thomas Smith entity) for \$75,000.

Given that Davis was unaware of the loan applications sought and obtained for others in the scheme, he should not be responsible for the amount obtained in fraudulent loans for CFA, Glory Transportation, Rebels Paris, or Comfort Care. *Whitley*, 354 F.Supp.3d at 933. Though Davis was involved with facilitating Henley's contact

with Thomas Smith to try to obtain a loan for Premier Logistic, there is no restitution obligation because that loan was not funded. *Dridi*, 952 F.3d at 901.

Based on the facts detailed above, Davis' restitution should be joint and several with his co-conspirators, Thomas Smith and Stephen Smith. *Moeser*, 758 F.3d at 797.

D. Robert Hamilton

1. Facts

In his plea agreement, Hamilton admitted that he obtained a fraudulent PPP loan for Glory Transportation. *See* Robert Hamilton Plea Agreement, Attachment B. Stephen Smith approached Hamilton in April 2020 and asked if Hamilton had applied for a PPP loan. *Id.* ¶ 11. Hamilton had not, so Stephen Smith connected him with Thomas Smith, for the purpose of assisting Hamilton with the loan application paperwork. *Id.* Thomas Smith created a fraudulent PPP loan application for Glory Transportation and provided it to Hamilton. *Id.* ¶ 12. Hamilton agreed to pay Thomas Smith \$30,000 of the loan proceeds for completing the paperwork, and he did so by cashier's check. *Id.* ¶¶ 12, 17.⁸ Thomas Smith suggested that if asked, Hamilton should say the payment was for the purchase of equipment or vans, which was false. *Id.* ¶ 17.

2. Argument

Under 18 U.S.C. § 3664(h), Hamilton should be ordered to pay \$155,000 in restitution, which is the amount that Hamilton fraudulently obtained from Financial

⁸ After learning of the investigation, Thomas Smith returned the \$30,000 cashier's check to Hamilton. During his interview with law enforcement in July 2020, Hamilton voluntarily provided the check to an FBI agent, who still has the check in her possession. The government is working with Hamilton to determine whether the check can be voided or otherwise applied to his restitution obligation.

Institution 1 for the loan to his company, Glory Transportation. Given that Hamilton was unaware of the loan applications sought and obtained for the other defendants, he should not be responsible for the amount obtained in fraudulent loans for CFA, Davis Development, Rebels, or Comfort Care. *See Whitley*, 354 F.Supp.3d at 933. Hamilton's restitution award should be joint and several with his co-conspirators Thomas Smith and Stephen Smith. *Mooser*, 758 F.3d at 797.

E. Jonathan Henley

1. Facts

Jonathan Henley submitted a fraudulent loan application on behalf of his company, Premier Logistic. *See Jonathan Henley Plea Agreement, Attachment B* ¶ 9. Davis introduced Henley to Thomas Smith who created the fraudulent PPP loan application for Premier Logistic. *Id.* ¶ 15. Thomas Smith directed Henley to open a bank account at Financial Institution 1 and to drop off the PPP loan application to Financial Institution 1. *Id.* ¶¶ 16-17. Before submitting the loan application, Henley agreed to pay Thomas Smith a portion of the loan proceeds. *Id.* ¶ 18. The loan application, however, was denied. *Id.* ¶ 22.

2. Argument

Henley's fraudulent loan for his company did not result in losses to Financial Institution 1, so there can be no corresponding restitution obligation.⁹

⁹ The government is similarly not seeking restitution for the other fraudulent PPP loan for \$17,500 that Henley sought for his company because it also was not funded and did not result in a loss. *See Id.* ¶¶ 23-26.

F. Tarone Woods

1. Facts

Tarone Woods fraudulently obtained a PPP loan for his company, Comfort Care. See Tarone Woods Plea Agreement, Attachment B. At Thomas Smith's direction, in order to apply for the loan, Woods paid \$275 to reinstate Comfort Care as a company with the State of Wisconsin at Thomas Smith's direction. *Id.* ¶ 10. Thomas Smith provided Woods with the fraudulent loan application paperwork and directed Woods to open a bank account at Financial Institution 1. *Id.* ¶¶ 11-12. Woods agreed to, and did, pay Thomas Smith \$115,000 of the \$230,000 total that he received in loan proceeds.¹⁰ *Id.* ¶¶ 16, 17.

2. Argument

Tarone Woods pled guilty to one count of making false statements, in violation of Title 18, United States Code, Section 1001. Where false statements themselves cause losses, restitution is appropriate. See *United States v. Frith*, 461 F.3d 914, 919 (7th Cir. 2006) (restitution covers instances where losses were "caused by the specific conduct that is the basis of the offense of conviction."). Here, Woods was charged with making false statements to the United States Small Business Administration in the fraudulent

¹⁰ Woods' agreement with Thomas Smith was to pay him \$115,000 and Woods issued three cashier's checks (one to Thomas Smith directly for \$40,000, one to one of Thomas Smith's companies for \$40,000, and a third to a separate Thomas Smith company for \$50,000). Financial Institution 1 imposed a security hold on the latter two cashier's checks, meaning that the money remained in Woods's account. Therefore, only \$40,000 was successfully transferred to Thomas Smith.

loan application. *See* Information, 20-CR-197, Dkt. No. 2. Accordingly, the restitution owed is sufficiently connected to his offense.

Under 18 U.S.C. § 3664(h), Woods should be ordered to pay \$190,000 in restitution. This is calculated from the amount that Woods fraudulently obtained from Financial Institution 1 for the loan to his company Comfort Care (\$230,000), subtracting the \$40,000 in proceeds that he successfully transferred to Thomas Smith via cashier's check.

Woods' restitution should be joint and several with his co-defendant Thomas Smith. *Martin*, 195 F.3d at 969 (applying joint and several rule to co-schemers).

Woods should not be held responsible for the restitution owed for any of the others involved in the scheme because the facts show that he was not aware of nor was he involved in any steps involved in seeking any of the additional PPP loans. *See Whitley*, 354 F.Supp.3d at 933.

G. Deon Petty

1. Facts

Deon Petty submitted a fraudulent PPP loan application for his company, Rebels Paris. *See* Petty Plea Agreement, Attachment B. Marvin Fitzgerald introduced Petty to Thomas Smith and Stephen Smith in order to facilitate the application process. *See Id.* ¶¶ 9, 11. Stephen Smith directed Petty to open a business checking account at Financial Institution 1 in order to apply for the loan. *See Id.* ¶ 10. Stephen Smith prepared the loan paperwork which Petty signed and delivered to Financial Institution 1. *Id.* ¶¶ 11-12.

Petty agreed to pay Stephen Smith and Thomas Smith part of the loan proceeds for creating the loan application paperwork. After the Rebels Paris loan was funded, Petty paid \$30,000 to Stephen Smith from the loan proceeds. *Id.* ¶ 16. Petty also transferred loan proceeds to Thomas Smith through cashier's checks to two of his entities totaling \$45,000.¹¹ *Id.* Finally, Petty paid \$20,000 of the loan proceeds to Fitzgerald. *Id.*

2. Argument

Under 18 U.S.C. § 3664(h), Petty should be ordered to pay \$85,000 in restitution. This is calculated from the amount that Petty fraudulently obtained from Financial Institution 1 for the loan to his company Rebels Paris (\$155,000), subtracting \$30,000 that he paid to Stephen Smith, \$20,000 that he successfully paid to Thomas Smith, and \$20,000 that he paid to Fitzgerald, all from the loan proceeds. Petty's restitution should be joint and several with his co-defendants Thomas Smith, Stephen Smith and Fitzgerald. *Martin*, 195 F.3d at 969.

Petty should not be held responsible for the restitution owed for the CFA, Davis Development, Glory Transportation, or Comfort Care loans, because he was not aware of nor was he involved in any steps involved in seeking them. *See Whitley*, 354 F.Supp.3d at 933.

¹¹ Petty's agreement with Thomas Smith was to pay him \$45,000. Petty issued two cashier's checks to two different Thomas Smith entities (one for \$25,000 and one for \$20,000). Financial Institution 1 imposed a security hold on the \$25,000 check meaning that the money remained in Petty's account. Therefore, only \$20,000 was successfully transferred to Thomas Smith.

H. Marvin Fitzgerald

1. Facts

Fitzgerald submitted the fraudulent New Beginnings PPP loan application. *See* Marvin Fitzgerald Plea Agreement, Attachment B. Stephen Smith organized New Beginnings as a Wisconsin limited liability company in 2015. *Id.* ¶ 12. In connection with the offenses, Stephen Smith restored the company to good standing in May 2020 and offered to name Fitzgerald as the new agent for New Beginnings with the State of Wisconsin, with the goal of obtaining a PPP loan for the company. *Id.* ¶ 12. Stephen Smith then provided Fitzgerald with the fraudulent New Beginnings loan application paperwork. *Id.* ¶ 15. At Stephen Smith's direction, Fitzgerald opened a bank account at Financial Institution 1, and submitted the application package. *Id.* The New Beginnings loan was not funded. *Id.*

Fitzgerald also introduced his roommate, Petty, to Stephen Smith for the purpose of getting a PPP loan for Petty's company, Rebels Paris. *Id.* ¶ 16. After Petty's loan was funded, Petty paid Fitzgerald \$20,000 of the proceeds. *Id.* ¶ 17.

2. Argument

Fitzgerald was charged with making false statements to law enforcement as part of an attempt to conceal his involvement in the overall scheme. Restitution is not owed for this offense. *See Frith*, 461 F.3d 919 (restitution for false statements must be tied to the false statements). The government is in discussions with counsel for Fitzgerald about voluntary payment of the \$20,000 he received. If paid, the funds should be

credited to the restitution owed by Petty and any jointly and severally liable defendants.

V. VICTIM

Each of the PPP loans involved in the scheme was obtained from Financial Institution 1, described in the Indictment as “a federally insured financial institution and member of the Federal Home Loan Bank System headquartered in Green Bay, Wisconsin.” Indictment ¶ 17. The Indictment alleges that the bank fraud scheme defrauded Financial Institution 1. Indictment ¶ 21. As noted in the Indictment, the United States Small Business Administration (“SBA”) oversaw the PPP loan program. Indictment ¶ 16. But “individual PPP loans were issued by private, approved lenders who received and processed PPP applications and supporting documentation and then made loans using the lenders’ own funds, which were 100% guaranteed by the SBA.” *Id.*

Because Financial Institution 1 is the entity that directly funded the loans to each of the defendants, it is the victim in this case. *See United States v. Marr*, 760 F.3d 733, 744 (7th Cir. 2014) (holding that bank qualified as victim under MVRA because evidence showed that bank was “directly harmed by Marr’s wire fraud scheme”).

During the summer of 2020, the government learned that Financial Institution 1 froze certain customer accounts. The government believes that these accounts were

held both by the defendants on their own, and jointly with other individuals and that the funds in certain of the accounts are not limited to proceeds of the PPP loans.¹²

Any funds currently held in frozen accounts should not be deducted from the total amount ordered as restitution. Though a bank might utilize a self-help remedy to offset the proceeds to its losses from the fraud, it is not known whether such a remedy is appropriate under the circumstances and agreements between Financial Institution 1 and its customers. It is each defendant's responsibility to work with Financial Institution 1 and any joint account holders to determine whether, and if, the frozen funds would be applied to a restitution judgment. To the extent Financial Institution 1 and a defendant are able to reach agreement about applying money from their accounts towards restitution, the government requests that the defendant be ordered to notify the Clerk's office so that the Clerk can properly apply the amounts towards the defendant's restitution.

April 13, 2021

Respectfully Submitted,

DANIEL KAHN
Acting Chief, Fraud Section
U.S. Department of Justice

/s/ Leslie S. Garthwaite _____
LESLIE S. GARTHWAITE
LAURA CONNELLY
Trial Attorneys
Fraud Section
U.S. Department of Justice

¹² The government does not have any current information about the specific amounts held in frozen accounts.

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will provide copies to counsel for all parties.

*/s Leslie S. Garthwaite*_____

LESLIE S. GARTHWAITE

LAURA CONNELLY

Trial Attorneys

Fraud Section

U.S. Department of Justice